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No. 469

United States Court of Appeals

For the Second Circuit

CONSTANTINE MACRIS,

Plaintiff-Appellant,

against

SOCIEDAD MARITIMA SAN NICOLAS, S.A. and PETMAR AGENCIES, INC.,

Defendant-Appellees.

APPELLANT'S BRIEF AND APPENDIX

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APPELLANT'S BRIEF AND APPENDIX

This is an appeal from a judgment entered upon a memorandum and an opinion order of the United States District Court for the Southern District of New York.

At the close of the five day trial the court below delivered findings of fact by memorandum (R. 806-813, 649).

On re-argument, the court affirmed its "comments" in an opinion, dated December 31, 1955 (R. 814-820).

Judgment was entered thereon, January 18, 1956 (R. 821-823).

STATEMENT

This seaman's action for money damages, arising from personal injuries sustained while employed on the S.S.

Euryviades, owned, managed, operated and controlled by the defendants, was grounded upon the Jones Act, 46 U.S.C. § 688, and upon the general maritime law of Liberi ,[1] the law of the flag.

The causes of action as stated in the complaint were predicated upon (1) the hiring of the disabled seaman, previously injured aboard the ship due to the negligence of the defendants and their failure to provide plaintiff with a seaworthy vessel, (2) failure to provide the plaintiff with proper medical treatment and, (3) failure to furnish maintenance, cure and wages (R. 663-667—appendix, p. 2a-6a).

The plaintiff was employed aboard said vessel for a voyage from Piraeus, Greece (November 10, 1951) to Richmond, California (July 7, 1952). During the voyage plaintiff signed off the vessel at Baltimore and re-signed immediately thereafter (April, 1952).

The court below found:

1. Plaintiff was injured during the voyage in Bremen, Germany, January 8, 1952.

2. Plaintiff's condition progressed and worsened during the trip between Bremen and Baltimore, Maryland, reached in April, 1952.

3. Plaintiff's condition remained substantially the same after Baltimore and until the plaintiff underwent surgery on August 11 and 25, 1952.

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[1]The non-statutory general maritime law of the United States was adopted as the general maritime law of Liberia (R. 11, 12). As such, the general maritime law of the United States is applicable herein.

4. Plaintiff's complaint related only to that period from Baltimore and thereafter.

5. Plaintiff and defendants presented their cases for the entire voyage from plaintiff's original sign-on in Piraeus.

6. Since plaintiff's injuries progressed and worsened only during the period from Bremen to Baltimore and the complaint encompassed that period from Baltimore and thereafter, no recovery could be permitted.

7. Plaintiff's motion to amend the pleadings and to conform the pleadings to the proof was denied on the ground that there was no surprise to the **plaintiff** by the proof tendered.

8. The Jones Act was inapplicable in a claim in which plaintiff was a foreign seaman employed by the defendant shipowner corporation (controlled by American interests), solely because said corporation owned only 82% and not 100% of the vessel (the captains owned the other 18%).

THE QUESTIONS PRESENTED

Was it reversible error for the court below to deny plaintiff's motion to amend the complaint and to conform the pleadings to the proof, at the time of trial, in the absence of surprise to any party, and thereby deny to the plaintiff a recovery to which he was entitled on the merits, in the light of all admitted evidence?

Did the court below err in holding the Jones Act inapplicable in an action by a foreign seaman employed by

a foreign shipowner controlled by American interests, which corporation admitted ownership in, and actually owned 82% of, the vessel and when an American corporate defendant, controlled by the same interests, had exclusive management and operation of the vessel?

Did the court below err in denying maintenance and cure solely because of plaintiff's refusal to return to the marine hospital for further necssary treatment?

Did the court below err in failing to grant plaintiff his unearned wages to the end of the voyage?

THE FACTS

The plaintiff was born in Roumania in 1918, moved to Greece and was educated at the University of Athens, majoring in politics and government, until 25 years of age (R. 335). Plaintiff was with the Royal Greek Navy, managed a honey factory and was with the Department of State for two and one-half years (R. 336, 337).

In 1947 the plaintiff first went to sea as an apprentice, was promoted to second mate (R. 337) and sailed steadily until the voyage on the S.S. Euryviades in 1951 and 1952 (R. 444, 446).

The voyage started in Venezuela, September 1, 1951 (Deft. Exh. B). Plaintiff signed on the vessel in Piraeus, Greece, November 10, 1951, as second officer (R. 338, 449). He had passed a physical examination as fit for duty (R. 339). Nicholas Dracatos was the captain of the vessel. The captain's brother was the "second commander." There was no chief officer (R. 449).

The vessel sailed to Odessa, Russia; Belfast, North Ireland and arrived in Bremen, Germany on January 8, 1952 (R. 340, 341, 508-513).

At Bremen the vessel tied up parallel to the dock (R. 516). Plaintiff's position for the mooring operation was aft with crew members (R. 343, 516). The captain was on the bridge (R. 516).

Plaintiff was ordered by the captain to help the mooring operation by manually pulling on the mooring lines with the seamen and, while doing so, felt a pain in his groin (R. 345, 522-523). The plaintiff testified that such work was done only by seamen and not by officers (R. 346).

Plaintiff did no manual labor after feeling the pain (R. 526) and reported the accident to the "second commander" (R. 346).

The plaintiff testified [and this was admitted by the "second commander" (R. 580)] that he requested an examination of the condition (R. 350), that after several requests he was sent to a doctor on the 17th (nine days after the accident) (Plt. Exh. #4). Plainitff was told by the captain that the doctor advised that no operation was necessary (R. 352, 527) although the plaintiff requested one (R. 527).

The plaintiff further testified that on the voyage from Bremen to Santos, Brazil, he was ordered to chip paint with chipping hammers and paint (R. 354). The captain admitted that plaintiff painted the bridge (R. 581).

The vessel reached Santos on March 12, 1952 and, on plaintiff's request, because of the pain (R. 357), he was sent by the captain to a doctor (R. 355). A double truss was prescribed for the condition (R. 356). The captain was advised that the plaintiff had the beginning of a hernia (little hernia point) (Plt. Exh. #5), and that an operation was necessary (R. 583).

The vessel continued to Trinidad (R. 359), then to Baltimore, Maryland, and plaintiff was again ordered to chip, paint, manually aid in closing the hatches and to operate the winches (R. 359, 530).

In Baltimore, Dr. Kelly, employed by the defendant, examined the plaintiff on board the vessel, diagnosed plaintiff's condition as "dangerous" and advised an operation (R. 362, 535, 588) (Plt. Exh. #7—appendix, p. 6a-7a).

Plaintiff requested an immediate operation (R. 364), signed off the vessel because of illness (R. 535, 589) and at his request was taken by immigration officials to the United States Public Health Service Hospital for an examination, April 8, 1952 (R. 362, 415) (Plt. Exh. #6).

Plaintiff was found "fit for light work not involving heavy lifting" and returned to the vessel (R. 416) where he requested that he be returned to Greece (R. 537).

Plaintiff was offered repatriation to Greece on a vessel leaving 18 days later but when advised that he would be retained at Ellis Island, a "prison" for aliens, plaintiff refused (R. 538) and re-signed for the continuation of the voyage (R. 540, 590), the only alternative since plaintiff was not permitted to enter the United States (R. 599) (Deft. Exh. H).

On the voyage from Baltimore to Korea plaintiff felt worse, couldn't get out of bed at times (R. 417-418), but was again ordered to chip and paint despite his condition (R. 546).

In Korea plaintiff requested an examination by a doctor.

Ten to twelve days later, the request was granted (R. 418, 546, 595). Plaintiff was advised that he needed an immediate operation (R. 418).

Upon request that he be permitted to remain in Korea for surgical treatment, plaintiff was informed by the captain that he would be returned to the United States for an operation (R. 419).

The vessel sailed to Richmond, California, (R. 419) arriving July 3 or 4, 1952 (R. 420). Plaintiff signed off the vessel on July 7, 1952 for medical treatment (R. 421-422, 599) and returned to New York by train (plaintiff paid the fare, later reimbursed) (R. 423).

In New York, plaintiff discussed the question of his treatment with Panaghi D. Marchessini, the head of a shipping combine which included the defendants herein, and was examined by Dr. Dugdale who advised plaintiff to enter a hospital for the operation (R. 424, 550-551).

Marchessini refused to permit the plaintiff to enter the Marine Hospital at Staten Island and insisted that plaintiff return to Greece for surgery (R. 424-425, 551). After a 20-day delay, during which time no treatment was afforded the plaintiff, he was permitted to enter the Staten Island hospital (R. 426-427, 552).

Surgery was performed on August 11, 1952 and again on August 25, 1952. After the second operation plaintiff felt his bladder full and he was unable to pass water (R. 430). As a result of this condition plaintiff underwent numerous catheterizations and was transferred to the Urology Department for continued treatment (R. 431).

Plaintiff testified, both on direct and cross-examination, that he was advised by the Marine Hospital physician that two operations were necessary in August because of the progression of the condition over the seven-month period (R. 430, 565-6).

Dr. Warnock testified that he recalled having a conversation with the plaintiff in the Marine Hospital (R. 501), thus confirming, to that extent, plaintiff's testimony.

The doctor also stated that the condition of the patient determines the surgical procedure to be followed (R. 490-491).

"Q Inarticulately I intended to ask, you form an opinion before you go into surgery, do you not?

A Yes.

Q As to what you are going to do. Does that opinion include a decision as to whether you will do one side or both sides during the one operation? In other words, do you make up your mind before you start working?

A Generally, yes, sir.

Q In determining whether you will do one operation or two, what is your major consideration?

A Well, how the — what is going to be the ultimate outcome for the patient.

Q In other words, the patient's welfare, that is your primary concern, is that right?

A Yes, sir.

Q Is it his condition which is the basis of your decision as to what procedure you will follow, his state of health, the extent of the damage?

THE COURT: Why don't you ask him a general question rather than trying to lead him now?

Q All the factors which you find the patient has at the time, are they all part of the basis of your opinion?

A We take all those things into consideration.

Q The extent of the damage, is that one of the considerations?

A Yes."

Plaintiff further testified on the subject of his inability to have any sexual relations since the second operation and his resulting marital difficulties (R. 437-440). Plaintiff's sexual impotency was confirmed by Dr. Hyslop (R. 384).

After plaintiff's discharge on September 23, 1952 he was on outpatient treatment until December 29, 1952 (R. 432-3).

Plaintiff stated that in ' is visits to private physicians during 1953, 1954 and 1955 for catheterizations and other treatment, he incurred medical and medicinal expenses totalling $675.00 (R. 443-444). He explained that when his condition became such that he required a catheterization he would find a doctor to treat him, that the average charge was $5.00, that for the year 1955 to the date of trial he had been treated about 30 times (R. 562-564).

Plaintiff first returned to work on May 15, 1954 as a typist and clerk (R. 433-435).

THE PLEADINGS AND PROCEEDINGS IN THE COURT BELOW

The action was commenced on December 12, 1952 (R. 663, 669). Issue was joined on January 10, 1953 (R. 670-673) and a note of issue filed (R. 674).

Plaintiff's present attorney was retained in place of previous counsel on October 25, 1954 (R. 700).

A preference was thereafter granted (R. 713-717). In his affidavit in opposition to the preference application, signed January 17, 1955, defendants' attorney discussed the original injury in Bremen (R. 683-699). Obviously, even at this early date, the defendants were aware of the scope of plaintiff's cause of action and were defending against it.

On January 27, 1955, approximately nine months before trial, the examination before trial of the plaintiff was taken by the defendants at the office of their attorney (R. 733-777). Consisting of 45 pages, the examination of the plaintiff concerned itself, inter alia, with events from the time plaintiff signed on the vessel in Piraeus, Greece in November, 1951 up to and including the arrival of the vessel in Bremen and the continuation of the voyage to Baltimore. The questions concerning this period total 28 pages of the examination.

An amended answer was filed on June 10, 1955 (R. 711-712).

Thereafter, motions were made by the plaintiff and defendants (R. 723-726, 727-731, 778-783, 785-787, 801-805a), which are either immaterial herein or were not determined by the motion part and the trial court below as unnecessary for the adjudication of the law suit. However, the affidavits of the attorneys for all parties herein refer, on numerous occasions, to the injury sustained by the plaintiff in Bremen and the events which occurred during the voyage from Bremen to Baltimore, January to April, 1952, a further showing of notice of the claim.

At the opening of trial the attorney for the defendants, correctly assuming that plaintiff would move to amend and conform, opposed by affidavit said motion to amend the complaint to include that period from the injuries sustained by the plaintiff in Bremen and thereafter (R. 825-828).

The action was tried by the Court without a jury on the 25th, 26th, 27th, 28th and 31st days of October, 1955.

Plaintiff's opening statement encompassed that period from plaintiff's birth, his early life, signing aboard the vessel at Piraeus, Greece, his voyage to Bremen, his injuries at Bremen, the voyage to Baltimore and plaintiff's operations for his injuries at the United States Public Health Service, Staten Island, New York (R. 2-7). There was, in addition, a statement of contemplation by plaintiff's attorney to move to conform the pleadings to the proof of the original injury in Bremen (R. 7).

Plaintiff's attorney then stated the theory of liability to be one of negligence and unseaworthiness of the vessel in Bremen which caused the original injury and a

failure to treat the condition, necessitating two extensive operations instead of a single less extensive one. (R. 12-14).

During the trial and after direct examination of the plaintiff was completed, the court denied the defendant's motion to strike the testimony which dealt with incidents prior to the vessel reaching Baltimore (R. 444).

Further negating any question of surprise to the defendants by the introduction of facts prior to Baltimore, the defendants, cross-examining the plaintiff in testimony covering 40 pages of the minutes (R. 449-463, 508-532), asked 256 questions concerning facts of the voyage from Piraeus to Baltimore.

Plaintiff's attorney, after the close of plaintiff's testimony formally moved to amend the pleadings to conform to the proof (R. 568). The motion was denied without prejudice although the court expressed its opinion that there had been no surprise to any party by the evidence introduced (R. 569).

The defendants immediately thereafter, **on direct examination** of their witness, Dracatos (R. 570), asked 73 questions covering 14 pages of the minutes (R. 571-584) concerning the period of the voyage from Piraeus to Baltimore.

The plaintiff and Dracatos were the only fact witnesses.

During the closing statements by the attorneys for the parties and the comments by the Court (R. 607-655) the question of amendment and confirmation of the pleadings to the proof arose several times.

Conceding that evidence outside the scope of the pleadings had been introduced (R. 608), the defendants' closing statement concerned itself with the original injury in Bremen (R. 608-611).

Plaintiff's attorney discussed the question in the following manner (R. 632-633):

> "The condition, injury which Mr. Macris had, which we claim was negligently caused in the first instance, and with all sequellae flowing therefrom, is the responsibility of the respondent. That is why I made my motion to amend the pleadings to conform to the proof."

and then commented on the facts which occurred before Baltimore (R. 633-635).

The court below in its memorandum first stated that it would deny the motion to amend and gave as the basis for its decision the lack of foundation or surprise to justify the amendment of the pleadings at that time (R. 806-7).

The court held that the original hernia injury in Bremen was not caused by the negligence of the defendants or unseaworthy condition of the vessel (R. 807), that although the plaintiff's condition did not deteriorate between Baltimore and Staten Island, "it did progress and get worse between Bremen and Baltimore" (R. 807), and further commented on the fact that an operation was recommended at Baltimore (R. 807).

Although the issue of foreseeability of the injury to the bladder as a sequellae of the delay in performing the

operation was expressly left unanswered (R. 809), there was a finding of fact that the injury resulted from the anesthesia administered during the **second** operation (R. 809).

In addition, the Jones Act was held inapplicable, but the general maritime law was applied, since the vessel was partially owned by the captain and his brother (R. 810).

Concluding, the court did not deem it necessary to decide the amount of maintenance and cure due the plaintiff (R. 810) or the validity of the "waiver" signed by the plaintiff at Baltimore (R. 812).

On the motion for re-argument, the court affirmed its views that the plaintiff's claim was limited to a claim for aggravation after Baltimore, and held that any evidence introduced of events prior to that period was received solely upon the issue of the defendants' duty subsequent to Baltimore (R. 816).

Conceding that the motion to amend was made at the close of trial, the court held that the defendants had no notice of intent to amend (R. 820), that the proposed amended issue was not tried by the expressed or implied consent of the defendants (R. 819).

POINT I

The court below erred in denying a motion to amend the pleadings and to conform the pleadings to the proof, made at the time of trial by the plaintiff, in the absence of surprise to the defendants and when such denial resulted in an opposite determination than the findings indicated on the basis of all the admitted evidence.

The court below found an aggravation of an injury caused by a seven-month delay in treatement. As such the court should have determined the matter in plaintiff's favor in the interest of justice and equity as proved by the factual evidence.

The denial of such justice on the narrow and technical procedural basis of denial of a motion to amend the pleadings and to conform them to the proof would appear to be in direct conflict with the views expressed by the Supreme Court of the United States in *Pope & Talbot v. Hawn*, 74 S. Ct. 202. wherein said Court expressed its opinion that the basis of decision should rest upon substantial justice irrespective of choice of forum or form of pleading.

The case of *United States v. Memphis Cotton Oil Co.*, 53 S.Ct. 278, seems determinative of this issue. Suit was brought against the United States to recover an overpayment of taxes. The Government opposed recovery upon the ground that the claims filed for the refund were too vague and indefinite and that amendment came too late. Judgment for the taxpayer was confirmed, the Court stating (281-282):

"The Commissioner has the remedy in his own hands if the claim as presented is so indefinite as to cause embarrassment to him or to others in his Bureau. He may disallow the claim promptly for a departure from the rule. If, however, he holds it without action until the form has been corrected, and still more clearly *if he hears it, and hears it on the merits, what is before him is not a double claim, but a claim single and indivisible, the new indissolubly welded into the structure of the old.* (Italics ours).

Rule 15 of the Federal Rules of Civil Procedure was adopted for the very purpose of guaranteeing to a suitor his day in court on the merits, not emasculated by narrow concepts and interpretations of pleadings.

Rule 15 of the Federal Rules states:

"Rule 15. Amended and Supplemental Pleadings

(a) Amendments.

. . . . a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

(b) Amendments to Conform to the Evidence.

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion

of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

Barron & Holtzoff, "Federal Practice and Procedure", Vol. 1, discussing Rule 15, states as follows:

"Sec. 441. Function and Effect of Amended Pleading

The purpose of an amended pleading is to include matters which occurred before the filing of the original pleading but which were either overlooked by the pleader or were unknown to him at the time. It is a substitute for the original and relates to the facts that existed when the original pleading was filed." (P. 872).

"Sec. 442. Liberality in Allowance of Amendments.

Under this rule leave to amend pleadings should be granted freely when justice so requires and the adverse party will not be prejudiced thereby, to clarify the issues and expedite the disposition of litigation." P. 872-874).

"Sec. 442. Liberality in Allowance of Amendments.

Rule 15, which requires court to grant leave to amend freely when justice so requires and which provides for relation back of amendments was drawn to give effect to principle that cases should, as far as possible, be determined on their merits and not on technicalities." (1956 Pocket Part, p. 234)

"Sec. 445. Discretion of Court

The trial court is vested with a sound discretion in granting or refusing leave to amend.

*** *** *** ***

In the absence of an abuse of discretion the trial judge's allowance or refusal of leave is not reviewable on appeal. However, the trial court's discretion may be controlled by the appellate court, and a failure to exercise discretion may result in reversal." (p. 880-881)

"Sec. 446. Timeliness of Motion to Amend

*** *** *** ***

As a general rule unless the rights of the adverse party are prejudiced, leave to amend may be allowed at any stage of the case where justice requires.

*** *** *** ***

The determination of timeliness of an amendment and of laches of the moving party depends entirely upon the particular facts and circumstances of each case and delay alone is not necessarily the decisive factor. Thus the court, exercising a wise discretion, may allow amendment after pleading time, after issue

has been joined, after dismissal of the complaint, after pre-trial conference, when trial is about to begin, during the course of trial, after verdict or judgment, and even on appeal or after remand." (p. 886-891)

"Sec. 447. Matters Considered on Motion to Amend

The primary consideration in determining whether to grant or deny an application for leave to amend is whether the allowance thereof will work an injustice to any of the parties. The interests of both parties should be considered and opportunity given the pleader to present his contentions." (p. 893)

"Sec. 449. Amendments to Conform to the Evidence

Rule 15 (b) sanctions amendments to conform to the proof (1) when issues not pleaded are tried by consent, express or implied, and (2) when evidence is objected to as not within the issues made by the pleadings, but the presentation of the merits will be aided and the opposing party not prejudiced by the amendment. Thus the objection that evidence, otherwise competent, is at variance with the issues made by the pleadings is not decisive. The variance may be corrected by amendment, in the sound discretion of the trial court.

A motion to amend to conform to proof may be made and granted at any time after presentation of the evidence has begun, and is frequently allowed during the course of the trial after the close of the testimony, and even after return of verdict, or entry of judgment, or on appeal, or after remand." (p. 914-915)

In Brown v. Dunbar & Sullivan Dredging Co., 189 F.2d 871, (2d Cir.), an action for wages and liquidated damages under the Fair Labor Standards Act, judgment for the plaintiff was affirmed wherein the district court permitted the filing of an amended complaint adding parties to the suit. This Court stated:

> "If then amendments were presented, the judge could consider them in the interest of orderly procedure and in the spirit of the free amending privileges contemplated by the rules, with no time barriers involved. See also, Bartels v. Piel Bros., supra. After all, the rules were intended to facilitate the application of substantive law, not to fight it." (p. 875)

Kerrigan's Estate v. Joseph E. Seagram & Sons, Inc., 199 F.2d 694 (3d Cir.), an action to recover money wrongfully paid under contract, reversed and remanded a judgment for the plaintiff.

There had been a cross-claim under Rule 13(g), not filed, which had arisen out of the same general transaction. The Court permitted an amendment conforming the pleadings to the proof and stated:

> "We are accustomed to the application of the rule that pleadings may be treated as amended to conform to proof. F.R.C.P. Rule 15. 3 Moore's Federal Practice 846. Analogous situations include treating an action erroneously brought at law as transferred to equity (3 Moore's Federal Practice 822), and treating issues actually tried as having been raised in the pleadings (Id. at 843). Certainly a pleading is judged by its substance and not its form, e.g. whether a claim is a counter claim or cross-claim depends not on what it is

labeled but whether the party against whom it is asserted is an opposing party or a co-party. 3 Moore's Federal Practice 15. Amending to show jurisdiction is liberally granted when the court in fact has jurisdiction. 3 Moore 831, 836. As a practical matter the only reason for not allowing an amendment is prejudice to the opposing party and no prejudice can arise here where all parties concerned joined in the stipulation." (p. 696)

In *Robbins v. Jordan*, 181 F.2d 793, (C.A. D.C.) a suit for malpractice, plaintiff moved at the time of trial for an amendment of the pleadings, which was denied. Plaintiff appealed from the directed verdict for defendant at close of plaintiff's case. The appellate court reversed and remanded, holding:

"Having found that the court's refusal to grant the plaintiffs leave to amend their complaint worked to their prejudice, the only other problem for us to decide,, therefore, is whether or not the learned trial judge exceeded the limits of his discretion in so refusing. Rule 15 (b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., provides in part: '*** If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense on the merits. The court may grant a continuance to enable the objecting party to meet such evidence.'

As was said in International Ladies' Garment Workers' Union v. Donnelly Garment Co., 8 Cir., 1941, 121 F.2d 561, 563: 'The Supreme Court of the United States has fixed the limits of permissible amendment with increasing liberality and has ruled that a change of the legal theory of the action is no longer accepted as a test of the propriety of a proposed amendment **** Rule 15 of the Rules of Civil Procedure**** expresses the same liberality with respect to the amendment of pleadings.'

(1) Amendments under Rule 15 (b) are, as a general rule, allowed with great liberality, Federal Deposit Ins. Corp. v. Siraco; Watson v. Cannon Shoe Co.; Newman v. Zinn; Pearl Assur. Co., Ltd., v. First Liberty Nat. Bank.

*** *** *** ***

(2, 3) There can be no question that a defendant should be protected from surprise resulting from a change of theory; but it is our opinion that the court erred in the method it chose to protect him. The proper procedure would have been to grant the defendant a continuance in order to meet the new evidence. But it was beyond the limits of its judicial discretion to refuse to allow the amendment." (p. 794-795)

In *International Ladies' Garment Workers' Union v. Donnelly Garment Co.*, 121 F.2d 561, (8th Cir.), a petition for rehearing and motion to modify on opinion, the Court stated its view with respect to Rule 15, as follows:

"(1) The tendency of the federal courts has been

consistently towards greater liberality in the allowance of amendments to pleadings.

*** *** *** ***

' . . . when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied.' See, also, Manhattan Oil Co. v. Mosby, 8 Cir., 72 F. 2d 840, 843, 844; United States v. Powell, 4 Cir., 93 F. 2d 788, 790. The Supreme Court of the United States has fixed the limits of permissible amendments with increasing liberality and has ruled that a change of the legal theory of the action is no longer accepted as a test of the propriety of a proposed amendment. United States v. Memphis Cotton Oil Co., 288 U.S. 62; 68, 53 S. Ct. 278, 77 L. Ed. 619. Rule 15 of the Rules of Civil Procedure, 28 U.S.C.A., following section 723c, expresses the same liberality with respect to the amendment of pleadings." (p. 562-563)

Voltmann v. United Fruit Co., 147 F.2d 514 (2d Cir.), was an action for personal injuries for negligence. On trial, defendant moved to amend its answer modifying an admission, which was granted. The appellate court held that it was not error since plaintiff had an adequate opportunity to present proof on the subject. Plaintiff did not move for an adjournment in order to obtain and present proof.

In affirming judgment for the defendant this court held:

"The amendment was well within the letter and spirit of Rule 15 (a), Federal Rules of Civil Procedure, 28

U.S.C.A. following section 723c, and if the plaintiffs were really surprised and put to some disadvantage greater than the expenditure of time and effort to get additional procurable evidence at that time their attorney should have requested a postponement of the trial in order to prepare his case properly." (p. 516)

In *Underwriters Salvage Co. v. Davis & Shaw Furniture Co.*, 198 F.2d 450, (10th Cir.), for recovery of damages in a warehouse fire, judgment for plaintiff was affirmed.

The district court decided the case on grounds other than alleged in the complaint.

The Court stated:

"As we said in Kilbourn v. Western Surety Co., 10 Cir., 187 F.2d 567, 571, 'The new rules of Federal Procedure were adopted to unshackle the practice of law in the courts from the straight jacket of technical rules of pleading and procedure. The rules were liberalized to the end that there might be more speedy and complete adjudication of a controversy between all interested parties without regard to technicalities and mere formal technical rules.' Under Rule 15 (b) 28 U.S.C.A., a liberal provision is made for amendments to conform the pleadings to the evidence and in such cases it is the duty of the court to consider issues raised by evidence received without objection even though no formal application is made to amend. El Paso Electric Co. v. Surrency, 10 Cir., 169 F. 2d 444; Simms v. Andrews, 10 Cir., 118 F. 2d 803; Pasquel v. Owen, 8 Cir., 186 F. 2d 263; Ruud v. American Packing & Provision Co., 9 Cir., 177 F. 2d 538." (p. 453)

Lloyd v. United Liquors Corp., 203 F.2d 789, (6th Cir.), was an anti-trust action. Judgment for defendant was reversed and remanded. The district court had dismissed the action on motion, for lack of jurisdiction. Plaintiff had proposed an amendment of the complaint, which was refused. In reversing, the Court stated:

> "Rule 15 (a), Federal Rules of Civil Procedure, provides that leave to file amendments to pleadings 'shall be freely given when justice so required.' Rule 15 (b) further evinces the purpose of the rule makers to have been that material amendments shall be freely allowed to accomplish the presentation of an action on its merits. Under this rule, certain amendments may be made, 'even after judgment.'
>
> In Sinclair Refining Co. v. Bennett, 6 Cir., 123 F.2d 884, 886, this court, pursuant to its interpretation of Rule 15 (b), held that a trial court properly allowed the plaintiff in an action for damages to amend her declaration *at the close of the evidence*, to conform to her view of the evidence as it affected the plea of the statute of limitations. We expressed the opinion that the amendment was properly allowed in the interest of justice. See also Tahir Erk v. Glenn L. Martin Co., 4 Cir., 116 F. 2d 865, 871, stating the principle that, under Civil Procedure Rule 15 (a), the liberal allowance of amendment of pleadings is a 'complement to restriction of objections for substance and form.'
>
> In International Ladies' Garment Workers' Union v. Donnelly Garment Co., 8 Cir., 121 F. 2d 561, 563, the Court of Appeals pointed out that the tendency of the

federal courts has been consistently toward greater liberality in the allowance of amendment to pleadings, and said: 'The Supreme Court of the United States has fixed the limits of permissible amendment with increasing liberality and has ruled that a change of the legal theory of the action is no longer accepted as a test of the propriety of a proposed amendment. United States v. Memphis Cotton Oil Co., 288 U.S. 62, 68, 53 S. Ct. 278, 77 L. Ed. 619. Rule 15 of the Rules of Civil Procedure, 28 U.S.C.A., following section 723(c), expresses the same liberality with respect to the amendment of pleadings.' For illustration of the extent to which has been carried the liberality to be accorded in the matter of amendment of complaints under Rule 15 of the Federal Rules of Civil Procedure, see the opinion of the Supreme Court in Tiller v. Atlantic Coast Line Railroad Co., 323 U.S. 574, 580, 581, 65 S. Ct. 421, 89 L. Ed. 465." (p. 793)

See: *Sunray Oil Corp. v. Sharpe*, 209 F. 2d 937 (5th Cir.);

United States v. Koike, 164 F. 2d 155 (9th Cir.);

McDowall v. Orr Felt & Blanket Co., 146 F. 2d 136 (6th Cir.);

Tahir Erk v. Glenn L. Martin Co., 116 F. 2d 865 (4th Cir.);

Baltimore & O. R. Co. v. O'Neill, 211 F. 2d 190 (6th Cir.);

Heay v. Phillips et al, 201 F. 2d 220 (9th Cir.);

Holley Coal Co. v. Globe Indemnity Co., 186 F. 2d 291 (4th Cir.);

Stepp v. United States, 207 F. 2d 909 (4th Cir.);

Tiller v. Atlantic Coast Line R. Co., 65 S. Ct. 421.

The cases relied upon by the Court below appear to be inapplicable herein. *Simms v. Andrews*, 118 F. 2d 803, (10th Cir.), 1941, was a suit against the Collector of Internal Revenue to enjoin a sale of realty for a tax deficiency and for a return of notes claimed to have been unlawfully levied upon it.

The trial court denied a motion to conform the pleadings which would have set up, after judgment, an entirely new issue of the statute of limitations, which issue had not arisen at the trial.

The appellate court affirmed on the ground that the issue had not been presented at the trial so that there was no proof to which the pleadings could be conformed.

United States v. Brookhaven, 134 F.2d 442 (5th Cir.), 1943, concerned an attempt after defendant's judgment in a suit at law to amend the complaint and pray for equitable relief. The Court, denying the motion, held, inter alia, that the new bill would be against other parties and implied that a new claim for relief should be brought.

Nordstrom v. McAllister, 9 F. R. Service, 15b.1, Case 5, p. 335, concerned itself with a motion to conform the pleadings to the proof, after judgment, in order to set up a defense of limitation of liability. The court held that the issue of limitation was not tried by express or implied consent of the parties, that evidence of privity was not in the mind of any party during the trial insofar as presenting the issue of limitation.

By the above quoted cases it would appear that a motion to amend the pleadings and to conform said pleadings to

the proof would be freely granted, in absence of such surprise to the party **in opposition** that the issue could not be defended.

The court below misinterpreted Rule 15 and applied a directly contrary test for motions of this nature, to wit, whether the **movant** was surprised by the issue.

This construction of the rule is diametrically opposed to its express purpose—extreme liberality in freely granting the relief, as is fully set forth above.

In the absence of any surprise to the defendants herein, it is respectfully submitted that the court below was in error in denying said motion, further emphasized by the fact that an opposite ruling would have resulted in a judgment in favor of the plaintiff.

Appellant humbly suggests that the following facts are determinative on the issue of surprise:

1) The complaint presented sufficient facts and information under the Federal Rules of Civil Procedure to notify the defendants of the original injury in Bremen during the voyage and prior to the vessel's arrival in Baltimore.

Paragraph 6 of the complaint spells out the prior injury caused by the negligence of the defendants and their failure to provide a seaworthy vessel. The sole data lacking is the date of the original injury.[2]

[2]The lack of ambiguity of the complaint was demonstrated by the absence of any motion under Rule 12 for a more definite statement.

Under the Federal Rules, a complaint is merely a notice of claim and the theory of liability upon which the claimant relies. *Hickman v. Taylor*, 67 S. Ct. 385; *Continental Collieries v. Shober*, 130 F. 2d 631; *Hirshorn v. Mine Safety Appliances Co.*, 193 F. 2d. 489; *United States Plywood Corp. v. Hudson Lumber Co.*, 17 F.R.D. 258. As such, appellant submits that the defendants were put on notice of an injury caused by their wrongful acts in the complaint.

2) The defendants were aware of the nature of the claim on January 17, 1955.

In his affidavit in opposition to plaintiff's application for a preference in January, 1955, the defendants' attorney spelled out the facts of the original injury in Bremen and the claims thereunder. (R. 683-699).

3) The examination before trial of the plaintiff on January 27, 1955, by the defendants fully informed them of the events giving rise to the cause of action from the time of plaintiff's sign-on in November, 1951 until the then present date.[3]

It can hardly be seriously contended by the defendants that they were not fully informed of all of the facts which occurred during the voyage, and more specifically that period from plaintiff's sign-on in Piraeus, in view of the affirmative steps taken by the defendants in their pretrial preparation, **nine months before trial.**

4) On numerous motions[4] **by the plaintiff and the defendants, the claim herein was characterized as one**

[3] Ante., p. 10.
[4] Ante., p. 11.

arising from an original injury in Bremen, rather than one solely for failure to treat after Baltimore.

5) The issue of amendment and conformation was placed before the court below even before the introduction of any evidence. Plaintiff's opening statement concerned itself with the period from plaintiff's sign-on in Piraeus. During said statement plaintiff's attorney observed that "due notice" had been given of plaintiff's intention to amend and conform (R. 7). This was not denied by the defendants.

Thereafter, the question arose during the introduction of evidence on several occasions (R. 341-2, 444, 568) and during the closing statements and the court's comments (R. 608, 647, 651, 652). Although the defendants objected to the introduction of evidence of events prior to Baltimore, there was no assertion of surprise or inability to defend on the issues. The court admitted all evidence offered.

The record of the trial conclusively belies any possible charge of surprise since the defendants extensively cross-examined the plaintiff concerning the pre-Baltimore period[5] and, on direct examination of their witness, Dracatos, thoroughly delved into the events from Piraeus to Baltimore.[6]

The defendants offered the crew list for the voyage involved herein into evidence. Said voyage commenced on September 1, 1951 in Venezuela and terminated on July 24, 1953 in Italy (R. 456-7) (Deft. Ex. B). Thus the entire

[5]Ante, p. 12
[6]Ante, p. 12

period encompassed by this suit was one voyage and could not be severed as was erroneously attempted by the court below.

The court specifically found an absence of any surprise by the introduction of the evidence concerning the period from Piraeus to Baltimore (R. 806-7).

Appellant respectfully submits that, in absence of surprise, such narrow interpretation of Rule 15 subverted the concepts of justice and equity to be afforded all litigants and calls for reversal of the decision of the court below.

POINT II

Failure to provide an injured seaman with prompt, proper and adequate medical treatment gives rise to a cause of action within the purview of the Jones Act and/or under the provisions of the General Maritime Law.

In *The Iroquois*, 24 S. Ct. 640, a libel for failure to treat for refusal of the vessel to deviate to an intervening port in order to obtain proper surgical attendance for the injured libelant, the Supreme Court stated:

> "The duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all maritime nations. It appears in the earliest codes of Continental Europe and was expressly recognized by this court in the recent case of *The Osceola*, 189 U.S. 158, 47 L. Ed. 760, 23 Sup. Ct. Rep.483." (p. 640-641)

In *Cortes v. Baltimore Insular Line*, 53 S. Ct. 173, a death claim under the Jones Act, the Supreme Court, determining that the cause was within the purview of the Act, stated that although the duty arose under the provisions of the general maritime law for failue to provide proper medical treatment, the negligent failure to do so would give rise to a claim under the statutory as well as the non-statutory law.

Morris v. United States, 3 F. 2d 588, was a claim for failure to treat. Plaintiff sustained a hernia condition and requested care, which was refused. The captain felt that the plaintiff was shamming the injury. Holding for

the defendant on other grounds, the court declared that a cause of action for failure to treat would lie for a bona fide error of judgment by the captain.

In *The Point Fermin*, 70 F. 2d 602, the claim consisted of failure to treat an injury to a seaman's hand, sustained without fault of the vessel. Granting recovery, the court held that damages were recoverable for the negligent failure to treat and did not depend upon fault of the vessel for the original injury. The court further stated that except for an emergency, requiring an injured seaman to work in a manner detrimental to his condition would give rise to a cause of action.

> "In our opinion appellant is also entitled to recover damages because of the failure on the part of the master to provide him with proper medical care and attention. It is settled that the shipowner is under a duty to furnish medical aid to a seaman who suffers injury or becomes ill in the service of the ship, and damages for neglect of this duty may be recovered in a proceeding in rem. The Iroquois, 194 U.S. 240, 24 S. Ct. 640, 48 L. Ed. 955; Cortes v. Baltimore Insular Line, 287 U.S. 367, 53 S. Ct. 173, 77 L. Ed. 368. Except in the face of danger to the ship or other emergency, to require an injured or sick seaman to perform work substantially detrimental to his condition is in effect to fail and refuse to provide that care and attention to which he is entitled under the law." (p. 604).

In *De Zon v. American President Lines*, 63 S. Ct. 814, a Jones Act claim for an eye injury for failure to treat, the Court stated:

"When the seaman becomes committed to the service of the ship the maritime law annexes a duty that no private agreement is competent to abrogate, and the ship is committed to the maintenance and cure of the seaman for illness or injury during the period of the voyage, and in some cases for a period thereafter. This duty does not depend upon fault. It is no merely formal obligation and it admits of no merely perfunctory discharge. Its measure depends upon the circumstances of each case—the seriousness of the injury or illness and the availability of aid. Although there may be no duty to the seaman to carry a physician, the circumstances may be such as to require reasonable measures to get him to one, as by turning back, putting into the nearest port although not one of call, hailing a passing ship, or taking other measures of considerable cost in time and money. Failure to furnish such care, even at the cost of a week's delay, has been held by this Court to be a basis for damages." (p. 818-819)

In *Holliday v. Pacific Atlantic Steamship Co.*, 197 F. 2d 610, a seaman's badly swollen leg developed into septicemia. There was a 15 hour delay in calling a physician although the urgency was apparent.

The court held that the plaintiff did not have to prove with absolute certainty that the condition would not have developed had the doctor been called but rather that the likelihood of the arrest of the condition would have increased if there was no delay.

To the same effect, see: *McAllister v. United States*, 75 S. Ct. 6.

The case of *Robinson v. Isbrandtsen Co.*, 203 F. 2d 514, by this Court, granted recovery in a suit for failure to treat a condition which grew no worse because of the delay and which eventually resulted in complete recovery.

The Court held that the right of recovery stemmed from delay in treatment, not by reason of deterioration of the condition.

> "Aggravation is not synonymous with deterioration. Though plaintiff's condition grew no worse, failure to provide medical care would constitute aggravation, since with proper treatment he might have improved and been cured. Here again, the causal chain was cast by the testimony of plaintiff's expert witness. The evidence indicates that what should have been done was not, and what was done should not have been." (p. 515)

For the proposition that recovery is permitted for failure to furnish proper medical care and treatment in actions instituted for consequential damages, see: *North Alaska v. Larsen*, 220 F. 93; *The Eva B. Hall*, 114 F. 755; *The City of Alexandria*, 17 F. 390.

Norris, "The Law of Seamen," Vol. 2, discussing seamen's rights to medical treatment, states:

> "§ 579. Failure to Provide Proper Medical Attention.
>
> Arising out of the seaman's relationship to his vessel is the affirmative duty imposed by the general maritime law upon the master and owner to accord to him while aboard the vessel, such medical care and attention as the ship may afford.
>
> • • • • •

The failure of the master to furnish maintenance and cure to a sick or injured seaman, which failure causes or aggravates an illness, gives the seaman a right of action against the master and owner for the injury done to him. The recovery in such circumstances includes not only necessary expenses but also compensable damages." (p. 204)

"§ 584. Failure to Provide Proper Medical Attention: Hospitalization in Port.

When a vessel reaches port it is incumbent upon the master to provide a seriously sick or injured seaman with immediate hospital care. The duty is an affirmative one and where the external symptoms indicate the seriousness and danger of the illness or injury, the master will not be excused for failing to perform the duty to accord proper medical care because the seaman did not demand to be sent to a hospital." (p. 215)

"§ 585. Failure to Provide Proper Medical Attention: Damages.

The failure to give a seaman sick or injured in the service of the vessel proper and adequate medical attention is tortious and gives the seaman a right to proceed for damages. The courts allow compensatory damages for loss of future earnings, pain and suffering and for medical expenses incurred by the seaman.

In determining consequential damages, the courts take into consideration the suffering of the seaman as a result of the neglect and delay in giving him proper treatment." (p. 216)

Affirming a decree for the libelant in *The Svealand*, 136 F. 109, the Court of Appeals for the 4th Circuit held that the duty to furnish medical treatment was an affirmative one by the vessel. The court stated:

> "Nor was it necessary for him (libelant) to demand to be sent to a hospital. The duty imposed upon the ship was an affirmative one; that is, to care properly for a crippled seaman, and see that he was afforded prompt and proper medical and surgical treatment; and he should have been sent to the hospital in his then condition, and under no circumstances should the ship have put back to sea with a seaman, at the end of his voyage, in the crippled condition in which he was." (p. 112)

In *The M. E. Luckenbach*, 174 F. 265, the court stated the affirmative duty of the shipowner in this manner:

> "It was the duty of the master to look out for the care and health of the libelant, whether he made a request of him so to do or not; and from this testimony it is clear that libelant's condition, lasting during a period of seven days before reaching Colon, was such as to require of the master, in the exercise of that degree of care, consideration, and responsibility which his position imposed upon him, to see what was the character of the fever from which libelant was suffering, and was something as to which he could not hesitate, vacillate, speculate, or take chances upon. Ships of the size of the Luckenbach having no physician on board, the crew have to look to the master for proper care and medical treatment in matters affecting their health; and, when taken ill upon a voyage, the laws of humanity require that the master, having sick members of his crew in charge, should treat them with the

utmost care, kindness, and consideration consistent with the circumstances in which he is placed, and see that intelligent medical assistance is furnished as soon as possible." (p. 267)

See also: *The Badger*, 218 F. 81; *The Governor*, 230 F. 857.

In the instant case the court below found that there was a delay in treatment (R. 809). The original injury occurred in Bremen, January, 1952. Plaintiff was not surgically treated until August 11 and 25, 1952, some seven months later.

The court stated that it was convinced the injury was bona fide (R. 649).

The court specifically found that plaintiff's condition progressed and worsened during the period from the date of the original injury to the date of surgical treatment but dismissed the claim on the ground that the period of progression was outside that set forth in the complaint.

The captain admitted that the plaintiff did manual labor after the injury was incurred and that he had knowledge of said injury.

The captain failed to arrange for hospitalization to surgically correct the condition even when informed by the defendants' doctor that such treatment was necessary.

It is respectfully submitted that the elements of a cause of action for failure to treat in the case at bar are far stronger than those in *Robinson v. Isbrandtsen*, supra, in which this Court laid down the quantum of proof required for recovery by a seaman for the failure of the shipowner to fulfill its duties arising under the Jones Act and the general maritime law.

POINT III

Causal relation between plaintiff's condition, the necessary surgery and his post-operative difficulties was established and so found by the court below.

The district court accepted the conclusions of Dr. Hyslop (R. 622-3), plaintiff's expert witness who had examined the plaintiff at the defendant's request (R. 367, 809), that plaintiff's condition resulted from the anesthesia administered during the second operation.

> "Let me start you off by saying that I am disposed to accept the conclusion of Dr. Hyslop. I was quite impressed with him." (p. 622-623)

The doctor qualified as a neurologist specializing since 1922 in the organic nervous system (R. 366). His report, dated September 23, 1954, was introduced as Plaintiff's Exhibit #9, which pointed to the spinal anesthesia as the causative factor producing the plaintiff's present condition (appendix, p. 8a-10a).

The doctor performed a neuro-examination with particular attention to the functions of the lumbar and sacral segments (R. 370) and determined that the plaintiff suffered from a neurogenic bladder with damage to the cord centers caused by the operation with the anesthesia the "primary culprit" (R. 370, appendix, p. 13a).

He stated that delay could be a competent producing cause of aggravation (R. 374-5, appendix, p. 13a-14a), that the delay and aggravation could cause a hernia to be more extensive and require more extensive repair, and that

procrastination would have an adverse effect (R. 377-8, appendix, p. 14a-15a).

Continuing, his testimony was that plaintiff's atonic bladder was caused by the anesthesia administered during the operation and its effect on the centers of the spinal cord, that is predisposes to a complicated involvement of one or both kidneys (R. 378-9, 395—appendix, p. 15a-16a).

Syphilis and gonorrhea were ruled out as a causative factor (R. 384).

He further testified that plaintiff's sexual impotency was related to the lesion which caused the bladder condition and was not psychogenic in origin (R. 384, 394-5—appendix, p. 16a-17a).

Obviously impressed with the testimony and knowledge of the witness, the court then questioned Dr. Hyslop to further establish the medical causative factors (R. 402-410—appendix, p. 17a-23a).

The witness ruled out any other causes for plaintiff's condition due to his perfect recovery from the first operation (R. 402-3) and expounded upon his conclusions that the plaintiff's sexual impotency was also causally related to the operation since plaintiff had a persisting impairment of bladder function (R. 404).

He explained the process which caused the plaintiff's condition (R. 405-9),[7] concluding that the bladder con-

[7]The Court did not determine the foreseeability of his bladder injury as a sequel of the delay in operation (R. 809). Implicit in this statement however, is the finding of the Court that there was such delay.

dition was permanent with treatment emergent for infections and that the sexual malfunction might be cured by an operation (R. 409-410).

The court having found that the plaintiff's condition did result from the anesthesia administered during the second operation, the causal relation between plaintiff's present condition and the treatment afforded the plaintiff as a result of his condition caused by defendant's failure to treat, was established.

POINT IV

The Jones Act, 46 U.S.C. §688, is applicable herein.

Although the findings by the court below, as a practical matter, erased distinctions in this suit between an action under the Jones Act and one under the general maritime law, it is respectfully submitted that the question of the applicability of the Jones Act herein is of prime importance since, if this Honorable Court reverses and remands this matter for a new trial, in absence of a Jones Act cause of action, the question of the retention by the district court of a suit under the general maritime law between aliens would then arise, with a possibility of denial of such jurisdiction.

The following evidence was introduced at the trial by reading the examination before trial of the defendant, Sociedad Maritima San Nicolas, S.A., into the record (R. 42-108), which evidence clearly established the American interest, domination and control of the defendant corporations by Panaghi D. Marchessini.

Marchessini resides at 61 Olive Place, Forest Hills, New York, with his wife and two sons (R. 42, 106).

Born in Greece (R. 46), he first came to the United States in 1939 (R. 46) and established his permanent residence at the above address in 1949 (R. 47).

He became an American citizen on July 12, 1955 (R. 46), his wife and two sons having become citizens in 1953 and 1954 (R. 105).

Marchessini has paid personal income tax in the United States, jointly with his wife, and taking his sons as dependents, every year since 1949, (R. 91, 106, 107). His wife and children have no personal income from any source (R. 92, 93).

Marchessini has a controlling interest in seven shipping companies:

Petmar Agencies, Inc.; Sociedad Maritima San Nicolas, S.A.; Compania de Navegacion San Salvador, S.A.; P. D. Marchessini & Co., Inc.; P. D. Marchessini & Co., Ltd.; Compania de Vapores San Antonio, S.A.; and Bedford Overseas Freighters, Ltd., (R. 43, 45).

two of which are the defendants herein.

Marchessini has his offices at 21 West Street, New York, New York, the address of Petmar Agencies, Inc., (a Delaware corporation doing business in New York), and P. D. Marchessini, Inc. (R. 58). His domination and control of these various entities is as follows:

Petmar Agencies, Inc.—he owns 60% of its stock and is its President;

Sociedad Maritima San Nicolas, S.A.—all of the stock is owned by Compania de Navegacion San Salvador, S.A., and he is its President;

Compania de Navegacion San Salvador, S.A.—he owns 40% of its stock; Helen Marchessini, his wife, owns 20%; Demetri Marchessini, his son, owns 20%; and Alexander Marchessini, his son, owns 20%. He is its President;

P. D. Marchessini & Co., Inc.—he owns 75% of its stock and is its President;

P. D. Marchessini & Co., Ltd.—he owns 60% of its stock and is its Senior Director (no officers in British corporations);

Compania de Vapores San Antonio, S.A.—50% of its stock is owned by Compania de Navegacion San Salvador, S.A.—he is its President;

Bedford Overseas Freighters, Ltd.—50% of its stock is owned by Compania de Navegacion, San Salvador, S.A., and 50% of its stock is owned by Sociedad Maritima San Nicolas, S.A.—he is a director (no officers in Canadian corporations) (R. 43-51, 108).

Petmar is in the shipping business and is connected with the charter of ships, collection of freight payments and disbursements and representation of foreign shipping interests (R. 53-54) and acts as "exclusive agent" for all the corporations in which Marchessini has an interest (R. 55, 56, 59, 64). Petmar was engaged in chartering employment by the vessels of the various companies in the United States, as well as servicing of the vessels (R. 56).

The contract in existence between Petmar and San Nicolas at the time of plaintiff's injuries (R. 58) (Plt. Exh. #3—appendix, p. 11a-12a) granted Petmar **exclusive management and operation** of the vessel (Paragraph 1 of the contract). Said contract was signed by Marchessini for San Nicolas and by Paul Ganteaume, Vice-President under Marchessini for Petmar (R. 87). San Salvador has a similar contract with Petmar (R. 89).

San Nicolas, a Panamanian corporation, has offices in Panama and Bermuda (R. 61) but conducts no business from said offices (R. 93, 94). All chartering in the United States is done through Petmar in New York (R. 94).

Marchessini stated that he, as Senior Director, President and majority stockholder of the various corporations has a "strong voice" which "carries a lot of weight" (R. 74, 75) that he "works for" Petmar as an executive in an advisory capacity and makes the decisions since his advice is sought whenever possible (R. 97).

He further stated that San Nicolas does not pay dividends but reinvests the money in the common interest of itself and San Salvador (R. 85, 86). Concluding, he further admitted that his Panamanian corporations under the Liberian flag do not pay income taxes in Panama, Liberia or the United States (R. 81, 83, 84) and that the vessels are under the Liberian flag for, among other reasons, avoidance of taxes (R. 100).

The court below held that it had determined that the defendant-shipowner corporation was an American entity and that the Jones Act was applicable—until evidence was introduced of a minority interest in the vessel by the Captain and his brother (R. 810).

It is respectfully suggested that this latter consideration is completely immaterial to the question of interest, domination and control of the defendant corporations for the following reasons:

1. The minority (18%) interest holders of the vessel were not parties to this suit.

2. The minority owners had no financial interest in the defendant corporations.

3. The vessel could not have been and was not made a party hereto under the Jones Act. See *The Black Gull*, 82 F. 2d 758, (2nd Cir.), cert. denied 56 S. Ct. 954; *The Hanley*, 29 F. 2d 110, (2nd Cir).

4. The plaintiff was employed solely by the defendant corporations and is limited to a suit under the Jones Act and the general maritime law respectively against his employer, Sociedad Maritima San Nicolas, S.A., and the party having control of the vessel, Petmar Agencies, Inc.

Thus—the sole entities to be examined on the issue of the nationality dominating and controlling the defendant shipowner were Sociedad Maritima San Nicolas, S.A. and Petmar Agencies, Inc., a Delaware corporation.

The determination by the court below on the issue of American control was incorrect as influenced by immaterial facts. Since the court held the defendant corporations to be American controlled (in the absence of said immaterial facts), it is submitted that by reason of such finding of fact the Jones Act is applicable herein.[1]

[1]This point should not be construed as a waiver by the plaintiff of his cause of action under the general maritime law. Plaintiff's position is that the instant suit may be and was grounded both upon the Jones Act and the general maritime law with all the rights and privileges of each

POINT V

Plaintiff was entitled to maintenance and cure for the period that he was under medical treatment and until such time as he attains maximum medical benefits.

The court below determined that the plaintiff was entitled to maintenance and cure until his discharge from out-patient treatment at the Marine Hospital, Staten Island, New York (R. 820) and denied such maintenance and cure for further periods solely on the ground that the plaintiff declined to return to the Marine Hospital for the treatment that was required to arrest the progression of his condition and for further surgery (R. 820).

Plaintiff was not discharged as cured since he was required to return in January 1953 (R. 555). His failure to do so was due to fear (R. 555).

The parties stipulated that $8.00 per day was the prevailing rate of maintenance and cure for American ships (R. 433).

The plaintiff returned to work for the first time after the operations on May 15, 1954 (R. 434), as a typist and earned $1,375.00 from that date until October 15, 1954. Plaintiff was next employed in January, 1955 as a grocery clerk, earning $52.10 per week until October 10, 1955 and $56.30 per week thereafter (R. 435).

There was no denial that plaintiff required catheterizations for his condition and will require them for some time in order to arrest the progressive nature of his condition, nor that infections will develop, which will necessitate treatment. (R. 403, 409—appendix, p. 13a, 23a).

Dr. Hyslop testified that an operation exists which may cure the plaintiff's sexual impotency.

Thus plaintiff has not attained maximum medical benefit.

In *Calmar S.S. Corp. v. Taylor*, 58 S. Ct. 651, the Supreme Court considered the question of the extent of maintenance and cure. The Court determined that a lump sum for life could not be granted but that the duty to pay such monies would extend beyond the termination of the voyage for a reasonable time.

The question before this Honorable Court with respect to this issue is whether plaintiff's refusal to return to the Marine Hospital for further treatment was reasonable under all the facts and circumstances.

In *Luth v. Palmer Shipping Corp.*, 210 F.2d 224, the Court of Appeals (3d Cir.) stated its position in this manner:

> "It is true, as contended by respondent, that 'seaman's right to maintenance and cure is forfeited by voluntary rejection of hospital care.' But as we pointed out in *Murphy v. American Barge Line Co.*, 3 C.A., 1948, 169 F.2d 61, 64, certiorari denied 1948, 335 U.S. 859, 69 S. Ct. 133, 93 L. 60, 406, *the rule is not inexorably applied; other factors present must be taken into account and given effect.* Thus, in the *Murphy case* we held that it was the shipowner's duty to furnish a seaman transportation to a distant hospital and that since it did not do so the seaman's failure to avail himself of hospitalization did not amount to a refusal of treat-

ment precluding his recovery for maintenance and cure." (Italics ours) (p. 228)

In view of the extremely poor results from the second operation it is respectfully submitted that plaintiff's refusal to return to the hospital for further treatment was a reasonable one.

Whether maintenance and cure is due and owing is not a question of where the treatment is afforded the injured seaman but rather whether it is necessary and proper until such time as he attains maximum medical benefits.

The decision of the court below should be modified and maintenance and cure awarded the plaintiff for all periods to date, from the date of sign-off from the vessel, less moneys earned as a clerk, in-patient periods at the Marine Hospital and any sums heretofore given the plaintiff by the defendants.

POINT VI

Plaintiff is entitled to wages until the end of the voyage. Farrell v. United States, 69 S. Ct. 707.

Defendants Exhibit B, the crew list, revealed that the voyage terminated in Italy on July 24, 1953.

Plaintiff signed off the vessel because of his medical condition on July 4, 1952.

His earnings had been 70 pounds per month (R. 541).

He was thus entitled to unearned wages from July 4, 1952 to July 24, 1953, a sum total of 866.67 pounds, equivalent to $2,482.68.

It is respectfully submitted that the plaintiff has now due and owing to him the above stated sum, less any unearned wages previously received.

The court below failed to grant any sum for wages.

POINT VII

The issue of validity of an alleged "waiver" is not before this Honorable Court for determination.

The court below having expressly declined to determine the question of validity of a document stated by the defendants to be a "waiver" (R. 812), appellant respectfully submits that the issue is not before this Court at this time.

CONCLUSION

Appellant respectfully requests that this Honorable Court reverse the judgment of the court below and remand this cause to said court solely on the issue of foreseeability of the plaintiff's condition as a result of defendants' failure to treat and on the question of damages resulting from said failure, for maintenance, cure and wages or, in the alternative, that this Honorable Court determine and fix the amount of recovery to be had by the plaintiff by reason of the law and facts as set forth above.

Respectfully submitted,

JACOB RASSNER,
Attorney for Appellant

HARVEY GOLDSTEIN,
Of Counsel.

APPENDIX

United States Court of Appeals
For the Second Circuit

CONSTANTINE MACRIS,

Plaintiff-Appellant,

against

SOCIEDAD MARITIMA SAN NICOLAS, S.A. and PETMAR AGENCIES, INC.,

Defendant-Appellees.

Statement Under Rule 15(b)

This action for money damages arising out of personal injuries to a seaman is predicated upon the Jones Act, 46 U.S.C. § 688, and the general maritime law.

The action was commenced by filing the complaint on December 12, 1952. Issue was joined on January 10, 1953.

A preference was granted in June, 1955.

The cause came on for trial before Honorable Lawrence E. Walsh, without a jury, on October 25, 26, 27, 28 and 31, 1955.

The first cause of action was dismissed and recovery granted on the second cause of action on October 31, 1955.

An opinion order on reargument affirming the prior determination was filed on December 31, 1955.

Judgment was entered on January 18, 1956.

Notice of appeal was filed on January 31, 1956.

Plaintiff's previous attorneys were Sendler & Tryfores, 33 West 42nd Street, New York, New York. Jacob Rassner, 15 Park Row, New York, New York, was substituted as plaintiff's counsel.

Renato C. Giallorenzi, 50 Broad Street, New York, New York, is the attorney for the defendants.

Except as above stated there has been no change of attorneys.

COMPLAINT

(Record Page 663-667)

Plaintiff Demands A Jury Trial

Action under special rule for seamen to sue without security or prepayment of fees, for enforcement of laws of the United States, protection of health and safety at sea.

Complaining of defendants, plaintiff alleges upon information and belief:

FOR A FIRST CAUSE OF ACTION:

1. Plaintiff is a resident of the City and State of New York, of Greek nationality, and licensed as a mate of merchant vessels.

2. Defendant Sociedad Maritima San Nicolas, S.A. is a Panama corporation organized and existing by virtue of the laws of the Republic of Panama, and doing business through its agent defendant Petmar Agencies, Inc., with an office at No. 17 Battery Place, in the Borough of Manhattan, City of New York.

3. Defendant Petmar Agencies, Inc. at all times herein mentioned was and still is a domestic corporation organized and existing under the laws of the State of New York, and acting as agent for defendant Sociedad Maritima San Nicolas, S.A., with offices and place of business at No. 17 Battery Place, Borough of Manhattan, City and State of New York.

4. At all times herein mentioned, defendants owned, operated, managed and controlled the S.S. Euryviades, a merchant vessel.

5. At all times herein mentioned, plaintiff was in the employ of defendants on board the said vessel Euryviades as second mate at the rate of wages of $196.00 per month and board and lodging, having signed articles therefor at Baltimore, Maryland on April 7, 1952, and having continued in said employ through July 7, 1952.

6. When signing articles as aforesaid, and continuously thereafter while in the employ of defendants, plaintiff was to the knowledge of defendants sick, lamed and disabled through no fault of his own, but entirely through the fault of the defendants, their agents, servants and employees, in failing to furnish him with a safe place in which to work and to provide him with a safe and seaworthy vessel, and tools and appliances therefor, and in failing to provide him with competent co-employees and superior officers, and in failing to promulgate, maintain and observe proper and safe rules and regulations for plaintiff's safety.

7. Defendants specially induced plaintiff to sign articles as aforesaid by assuring plaintiff that he would be called upon to perform only light and supervisory duty.

8. During the time aforesaid, following such signing of articles, defendants required plaintiff to perform not only the regular duties of second mate, but also the duties of an ordinary seaman, without limitation and without consideration for the sick, lamed and disabled condition of plaintiff aforesaid, and in disregard of the inducement aforesaid extended to plaintiff to sign articles.

9. During the time last aforesaid, defendants negligently, by their agents, servants and employees, failed to furnish plaintiff with a safe place in which to work, or to provide him with a safe and seaworthy vessel, or tools and appliances therefor, or to provide him with competent co-employees and superior officers, or to promulgate, maintain and observe proper and safe rules and regulations for plaintiff's safety; and defendants failed to provide plaintiff with dry, warm and sanitary quarters in which to live while on board the said vessel Euryviades

10. In consequence of the foregoing, plaintiff's sick, lamed and disabled condition was by defendants' negligence aggravated and rendered more serious and grievous in degree, and plaintiff was caused to suffer, and continues to suffer pain and disability, and has been confined to his home and bed, or to a hospital for care and treatment, both medical and surgical, appropriate to the aggravated condition aforesaid, viz, bilateral inguinal hernia with involvement of adjacent organs, cystitis, and consequent impairments of bodily functions, by reason of which plaintiff's capacity to earn a living has been impaired for a long time to come, if not permanently.

11. In consequence of the foregoing, plaintiff has lost, and will continue to lose large sums of money which he otherwise would have earned, and has paid out, and will have to pay out large sums of money for his board and lodging, all to his damage in the sum of $50,000.00.

12. The jurisdiction of this Court is predicated upon a Federal statute, namely, the Jones Act (46 U.S.C. §688), and upon the General Maritime Law of the United States.

13. By reason of the foregoing, plaintiff has been injured and damaged in the sum of $50,000.00.

For a second cause of action repeating and realleging each and every prior allegation hereof, plaintiff further alleges:

14. Under the General Maritime Law of the United States plaintiff is entitled to Maintenance and Cure, and to his hospital and medical bills for a reasonable period of disability, and to his wages to the end of the voyage, in the sum of $50,000.00.

WHEREFORE, plaintiff demands judgment against the defendants in the sum of $50,000.00, on the first cause of action, and in the further sum of $50,000.00, on the second cause of action, being $100,000.00 in all, together with the costs and disbursements of this action.

SENDLER & TRYFOROS
Attorneys for Plaintiff
Office and P. O. Address:
33 West 42nd Street
Borough of Manhattan
City of New York (36)

[SAME TITLE]

Pltff. Exh. 7

U. S. Dist. Court, S. D. of N. Y., 26 Oct. 1955.

B. V. KELLY, M. D.
National Marine Bank Building
BALTIMORE 2, MD.
U. S. A.

April 7, 1952.

Constantine Macris
Liberian S. S. Euryviades
Second Officer.

The above named, complains of pain in the lower abdomen, upon the slightest exertion, and of late is so severe,

that the patient is forced to stop work, and at times is unable to work for the rest of the day.

Examination shows a right and left inguinal herniae, and from the history and examination, show obstructive signs, which demand operation, as soon as time permits.

s B. V. KELLY, M. D.

April 9, 1952.

To DOCTOR B. V. KELLY, Dr.
National Marine Bank Building
Baltimore 2, Md., U. S. A.

Liberian S. S. Euryviades & Owners
ACCIDENT CASE
Constantine Macris
2nd. officer
Right & left inguinal herniae.

Examination of the above named shows as the result of accidental origin while in the course of his regular duties, a right and left inguinal hernia, which causes patient much pain, and at times loss of time from his duties. He is afraid of strangulation, and probable gangerine, and wishes operation as soon as possible. Patient should be operated upon as soon as conditions permit.

Examination on board. 10.00

PAID by check No. 3451

Pltff. Exh. 9

Sept. 23, 1954

Re: Macris, Constantine
3538 - 34 Street
Astoria, L.I. - NY
Vs: SS "Euryviades"
Incident August 1952

Mr. T. N. Janis
J. C. Monroe
76 Beaver Street
New York, N. Y.

Dear Mr. Janis:

The above named 36 year old married chief mate was examined at my office this afternoon, September 22.

Apart from the fact that he is not fluent in English so that I did not attempt to get a detailed history not related to the present problem, there was no difficulty.

In August 1952 a right inguinal hernia was operated upon under spinal anesthesia and a couple of weeks later similar anesthesia was used when a left inguinal hernia was repaired.

The patient had no sensory or motor paralytic symptoms involving his trunk or lower extremities but from the time of the second operation and until four days later he was unable to empty his bladder and had to be catheterized. There was no disturbance of rectal function.

After he got home from the operation, he became aware of impairment of physical sexual capacity — incomplete erection and reduced sensation and ejaculation.

A month after the second operation he had transient pain in the upper lumbar region of his back on both sides.

From time to time he develops urinary retention and has to be catheterized. This symptom has led him to avoid returning to sea, on the ground that if such an emergency occurred, there would be no one available to catheterize him.

His impaired sexual function has led to domestic difficulty and he has had to ask his wife to be patient and put off her intention to seek a divorce. A Dr. Fiedler proposed an operation to correct the sexual difficulty, but the patient has no funds to pay for the surgery.

About a year and a half ago the patient began to have eposides of headache and dizziness, occurring every week or two.

The patient is otherwise without complaints and stated that prior to both operations he had excellent physical health.

In 1945 he acquired gonorrhea and recovered quickly without complication. He denied syphilis.

On a brief examination I found no evidence of syphilis of the nervous system and absolutely no motor, sensory or reflex disturbance of function in the lumbar and sacral segments.

I have noted the report of Dr. William L. Ferber whose survey revealed an atonic bladder with residual urine of from 12 to 14 ounces. The kidneys were normal.

This patient's bladder and sexual function defects are to be regarded as a complication of spinal anesthesia. Whether the needle used for the anesthesia actually penetrated the conus medullaris and injured the second to fourth sacral segment tissues controlling urinary function, or whether there has been a restricted and specific reaction to the anesthetic substance itself, cannot be stated. There is, in my opinion, no ground to regard the sexual defect as psychogenic, since the condition would naturally be associated with the organic lesion causing the atonic bladder.

I am surprised that none of the doctors who have studied this man have seen fit to train him in the use of a catheter. I believe that he is intelligent enough to be given such instruction, which would enable him to resume going to sea.

Not long ago one of the senior genito-urinary surgeons in New York City described an operation to correct the type of sexual function defect this patient has. Other surgical measures to deal with the bladder defect are outside of my province and knowledge.

Enclosed is the report of Dr. Ferber.

A review of the marine hospital records might give information requiring some modification of my opinion.

Sincerely,

s GEORGE H. HYSLOP, M.D.
129 East 69th Street
New York 21, N. Y.

CHH:EJ
Encl.

Pltff. Exh. 3

U. S. Dist. Court, S. D. of N. Y., 26 Oct. 1955.

Memorandum of Agreement dated the 3rd day of January 1950 between Petmar Agencies, Inc., a Delaware corporation of 17 Battery Place, New York City, hereinafter called the "Agent", and Sociedad Maritima San Nicolas S. A. of Panama City R. P., a corporation organized under the laws of the Republic of Panama hereinafter called the "Owner",

WITNESSETH

Whereas the Owner is the owner of a steamship, of the Liberty Dry Cargo type, called the "EURYVIADES", documented under the flag of Honduras, and desires to give the exclusive management and operation of said vessel to the Agent for a period of one (1) year from 1st January 1950 and the Agent is ready and willing to undertake the management and operation of said vessel.

Now, therefore in consideration of the mutual covenants herein contained and other good and valuable considerations, the parties hereto agree as follows:

1. That the Agent shall have the exclusive management and operation of said above-mentioned vessel for a period of one (1) year from 1st January 1950, and the Agent's compensation therefore shall be the sum of FIVE HUNDRED ($500.00) DOLLARS per month, including any lay-up periods, in addition to a commission of two and one-half (2½%) percent of gross freights, demurrage, dead freight, and all other charter fixtures compensation earned by the vessel during the period of this agreement.

2. That, unless the usual fittage is allowed by the contracting companies, the Owner will pay to the Agent such fittage on bunkers which, however, is not to exceed the rate of Eight ($.08) cents per barrel for such bunkers.

3. That whenever the presence of the Agent's Port Engineer, Paymaster, Port Captain or Chief Stewart is necessary, advisable or desirable at a port other than the Port of New York upon the arrival of said vessel, the Owner will pay all of the expenses and disbursements for and in connection with the personal attendance to the vessel by any one of the above-mentioned employees of the Agent.

4. That the Owner will at all times maintain with the Agent sufficient credit for the estimated cost of overseas expenses and disbursements for bunkers, port dues, agency fees, and other disbursements, paid or incurred at overseas ports.

5. If any loans at any time are advanced by the Agent to the Owner the amounts so loaned shall bear interest at the rate of four (4%) percent for the period during which they remain unpaid.

In Witness whereof, the foregoing agreement has been signed and executed by the parties hereto the day and the year above written.

Sociedad Maritima San Nicolas S. A.
By P. D. Marchessini

Witness
Macris

Petmar Agencies, Inc.
By Paul A. Ganteaume

Witness
S. M. Maloney

MINUTES

(Record Pages 370; 374-375; 377-378; 378-379, 395; 384, 394-395; 402-410)

(R. 370)

A He had a neurogenic bladder. In other words, there was damage to cord centers for bladder and some other similar segmental function as a byproduct of the anesthesia used in the operation.

Q Would you say that that was the direct sequelae of the operation? In other words, put it another way, was the operation a competent producing cause of the conditions which followed?

A Yes, the anesthesia was the primary culprit.

(R. 374-375)

Q Doctor, assume that this man's condition was such as is described in these various records, which I now will specifically call to your attention:

That his condition on the 17th day of January, 1952, was as described in Plaintiff's Exhibit 4; that on or about the 7th day of April, some two or three months later, his condition was as described in Plaintiff's Exhibit 2; assume that he continued to do work of a manual nature, such as is usually performed by an able-bodied seaman, including the painting and handling ship's gear and chipping of paint; assume that his condition by the time he entered the hospital was as described in Plaintiff's Exhibit 1;

Can you say with a reasonable degree of medical certainty whether the delayed treatment was an aggravating cause in this man's condition?

MR. GIALLORENZI: My objection to that is only one, and that is the amount of work which the plaintiff did during that period, manual work which Mr. Rassner was referring to.

MR. RASSNER: If the doctor can't state, we will add further, but I am asking the doctor if he can give an opinion on those facts as related.

A In answer to your question, it depends upon two things; one, whether examination findings on either of these three dates, January '52, April '52 and on admission to the hospital, enable one to judge whether there had been any change in the hernia found. What is recorded does not enable an opinion on that.

Q Well, can you tell us whether that delayed treatment is a competent producing cause of an aggravation?

A As a hypothetical thing, it can conceivably be, yes, certainly.

Q Then on a hypothetical basis, you say it is a competent producing cause, with a reasonable degree of medical certainty?

A It could be.

(R. 377-378)

Q Assume that in addition to the facts which I had given you, and referring to the various exhibits including 2, 7 and 1, and assume further that the man had increasing difficulty as time went by during the interval of time, would those facts enable you to give an opinion as to the causal relationship of the delayed treatment to an aggravated condition?

MR. GIALLORENZI: I object to this question.

THE COURT: What kind of an aggravating condition?

MR. RASSNER: To cause the hernia to be more extensive and require more extensive repair.

THE COURT: All right.

MR. GIALLORENZI: I object to that, your Honor, because the doctor has already answered "I don't know."

THE COURT: Well, he answered that on another question. I will overrule your objection. He can say it again if he wants to, but read the question back to the doctor and we will get his answer.

(Question read)

A That could be admitted, certainly.

Q Is that your opinion, doctor, with a reasonable degree of medical certainty? I use the words "reasonable degree of medical certainty" advisedly.

A It would be reasonable to feel that they had been adversely affected by procrastination.

(R. 378-379, 395)

Q Will you describe what atony of the bladder musculature is?

A It means the lack of tone in the muscles due to improper nerve supply.

Q And is that the direct sequelae of the anesthetic administered in the operation, including the effect of the operation itself?

A It is the effect of the anesthetic on centers in the spinal cord.

Q And how does that type of condition manifest itself, if at all, with relation to the kidneys? What if anything does it do?

* * * * *

A You are referring to the atony of the bladder?

Q Yes, sir.

A It predisposes eventually to a complicated involvement of one or both kidneys.

* * * * *

Q In other words, at the time that you examined him you felt that his condition was either due to a penetration of the needle in the spinal cord or the anesthesia itself?

A Either mechanical or chemical damage from the spinal anesthesia.

Q Or possibly damage to the spinal cord by the needle?

A That's right. I said mechanical or chemical. I said the conus medullaris, which is the lowest portion of the spinal cord and has to do with the sacral segments.

(R. 384, 394-395)

Q There was some testimony here that there was some psychogenic tendencies which were a contributing factor in the impotency or partial impotency or inability to have

an erection, sustain the erection, or to indulge in marital relations with his wife. Let's have the benefit of your opinion, based on your examination.

A Well, it was my opinion that his impotency was related to the lesion which caused his atonic bladder and it was not psychogenic in origin.

* * * * *

Q And that all your opinion, insofar as the impotency of this plaintiff, is primarily based on what he told you?

A No, he had the objective signs of an atonic bladder, and a person with an atonic bladder, you need not be surprised to find developing the type of physical functional defect and sexual activities that he described.

(R. 402-410)

BY THE COURT:

Q We have had testimony here which, in very crude terms, ranges from an opinion of a perforation of the spinal cord to an opinion that this bladder disturbance is caused by a chronic prostate difficulty.

Now, apparently you have ruled out the latter and concluded that he had — that here the spinal cord was damaged mechanically or by chemical intrusion.

Could you give me the reasons for your conclusion in a way that I can understand?

A Prior to the second operation, the story was of no disturbance of function involving the segments or the organs which made trouble immediately after the second operation. The cystscopic study of the man on September

10th or 19th, I believe, before he left the hospital, and about three weeks after his second operation, showed a normal prostate as to size, no obstruction of the urethra and no involvement of the floor of the bladder that would cause a mechanical difficulty that would lead to residual urine and a gradual secondary loss of tone of the bladder wall.

In other words, he did not have the obstructive mechanical prostate basis. He did show, as shown in his urinary, an infection complication of this retention process. He did get some infection in the prostate and that has been found in later examinations, varying from time to time, but at no time has his prostate — and I think the last examination in that regard was in the spring of this year — at no time has his prostate shown obstructive effects on the urinary pathway that would cause such bladder defect as was found in this man early in the game. So between no mechanical and no infective involvement of the prostate in August and September, 1952, I felt that there was no preoperative background which would predispose him to such a complication of the operation, whether it is spinal anesthesia or anything else that may have caused the complications.

Does that answer your question?

THE COURT: Yes, sir; I think that does.

Q One more question: You rule out psychogenic factors as a cause of this difficulty in completing sexual intercourse. Would you tell me again how you do that?

A My main reason was that he had been demonstrated to have a persisting impairment of bladder function, which

would be consistent with a physical basis for a comparable sexual functional disturbance. There was nothing about the man, as I could get it from his behavior and the way he cooperated, that implied emotional instability, that would make a sexual disturbance primarily psychogenic.

I don't question that there is a byproduct of some physically-based sexual function disturbance. There was emotional tension, instability from conflict with his wife. That would be a form of psychogenic, but not pathological response.

Q Now, will you explain to me, as an uninformed layman, how the damage to the bladder muscle nerve occurred? In other words, what the chain of events must have been from the injection of the anesthetic, and how that works.

A In the first place, the anesthesia is inserted inside of what is called the spinal canal. You are familiar with what that is?

Q No, sir. I should know, but I would much rather you tell me what it is so that I will be familiar with it.

A May I rub out some of that picture (indicating blackboard)?

MR. RASSNER: We won't need it any more.

THE WITNESS: I won't complicate it.

THE COURT: Don't worry about me. I would like to be informed, complicated or otherwise.

A (Demonstrating on blackboard) That circle represents the membranes surrounding the wall of what is

called the spinal canal, meninges. Inside the spinal canal is the spinal cord. The needle injecting the anesthesia penetrates the outer membrane, and this fluid fills this canal, except for the tissue of the spinal cord itself. That fluid injected, the local anesthesia will temporarily put to sleep the spinal cord subjected to it, which absorbs what is in the fluid around it, and we don't know — there have been plenty of theories — we don't know why in a given case a spinal anesthesia, even where you are sure there has been no mechanical reason for it, there is no penetration by a needle, we don't know what does it.

Q Now, where was the injection made in this case? I thought I had a note of it, but I don't. It was down in the sacral 3 and 4, wasn't it?

MR. RASSNER: We have that here. We have a complete record of it.

THE COURT: As I remember it, it was below the lowest point of the cord.

MR. RASSNER: Yes.

A Lowest expected point of the cord.

THE COURT: I see, yes.

MR. RASSNER: May I have this copy of the blackboard diagram put in evidence?

THE WITNESS: There are the numbers 3 and 4 for space. That is presumably between the third and fourth lumbar vertebrae.

Q Third and fourth lumbar vertebrae. Now, how does the location of the point of injection bear — as I remember it, the nerve affected —

A Let that be the body of a vertebra, spinus process sticking out this way, the first, second, third and fourth lumbar vertebrae. The center of the spinal cord may rest anywhere from here to here. Now, if you put that needle at this point, the spinal canal is fairly wide at this level, and if you put that needle at this point, the vertical plane, and stop it as soon as you get through the membrane, there is practically no chance that you do damage to the tipped end of the spinal cord, if it is that far down. If you are shoving hard from resistance and the thing goes through faster than you realize it, it may temporarily get far enough to scratch the surface. If your needle is playing up this way, and your spinal cord ends there, the same thing may occur.

The shape of the patient's back, the ease in getting in, the length of the needle, the diameter of the needle — all those things, and the experience of the man doing it, enable him to know with reasonable certainty an opinion as to whether his insertion of the needle may have done trouble, may have done tissue harm.

Q All right. Now, one thing, doctor, while you are still down there. Supposing a needle doesn't make contact with the end of the cord, how else could it do damage to the bladder nerve?

A By chemical.

Q The chemical that does the damage would run up along the canal?

A It is absorbed in the spinal canal at that level and

it gradually dissemanates. Eventually it gets higher, although no higher than the mid-thoracic region, but the main effect is on the portion of the cord nerve and there is temporarily a loss of function of the spinal cord. There have been animal experimental work which indicates in some animals the toxic reaction to the absorption of this fluid. Some cells become congested and may be harmed.

Q In other words, this spinal anesthesia was designed to operate on the cord?

A No, it was designed to do certain operations.

Q I mean, in other words, it was intended to affect the cord?

A That's right.

Q That is, for inserting the needle?

A Yes.

Q The idea was to insert the needle below the end of the cord into the canal, so that the fluid may carry the chemical up to the part —

A To the part of the cord you are interested in. If you are interested in the cord at this level, you are doing a gall bladder, you may combine spinal and general operation, you tip the patient head up and feet down. If you are working on the prostate you will not put the patient's head down; you will keep the fluid concentrated as low as you can. Here is a man having a hernia operation. He was horizontal. If they put in an adequate amount of that, they don't want to get it higher up because it would cause difficulties in respiration and they don't want to get it below that. So they keep the patient with his head not lower, so that the absorption of the fluid is limited to

the smaller area — its effect is limited to the smaller area of the spinal cord.

Q All right, sir. One other thing I would like is your opinion, if you have one, as to permanency or lack of permanency, as to this condition.

A The bladder defect, as far as I know — I say, as far as I know, and the GU men are always coming up with something now and then — as far as I know, you can't correct it. The man can keep track of his urinary pathway and if he gets infective symptoms, get busy with it. As far as sexual function disturbance is concerned, there have been in the last two or three years operations devised that have been reasonably successful in correcting this particular functional defect.

Q But the nerve to the muscle of the bladder?

A There is no way of fixing that, that I know of. There are no nerve grafts that I know of. Now, what they will do twenty years from now, I have no idea.

THE COURT: All right, sir. Thank you very much, doctor.

[SAME TITLE]

MEMORANDUM
(Record Pages 806-813)

WALSH, D.J.

THE COURT: I will tell you, let me make my comments and that will give you both something to shoot at. Let me start off with the motion addressed to the amendment of the pleadings. I am going to deny that motion. In the first place, I think the plaintiff has proceeded primarily on the basis of what had happened between Baltimore and New York anyhow. In the second place, I don't see any foundation, surprise or otherwise, which would justify changing the pleadings at this late date.

I am going to the merits, and I think I must conclude that there is no basis for recovery here except for maintenance and cure, and I will try to trace my reasoning.

The hernia occurred in Bremen. I don't think, under the pleadings, that what occurred before Baltimore is important except in so far as it explains what the various parties did in Baltimore; but I don't think, in any event, there was any proof here of any negligence or unseaworthiness of the vessel in Bremen. I think that a second mate on any vessel must be expected to be able to pick up a line and heave on it or lift it, and whether that is his ordinary duty or not, he cannot say that he has been put to some unanticipated or unreasonable task which would make the vessel liable if, through no one's fault, he suffers a hernia.

What gives me the most trouble, and I think that underlies fundamentally my conclusion, is that I think his hernia was just about as bad when he got to Baltimore the first time as when he got back to Staten Island for treatment. I think it did progress and get worse between Bremen and Baltimore, and at Baltimore it was described as a double hernia and we have a recommendation for an operation, not emergent but that it should be had as soon as time permits.

I don't recall anything in the record, and I listened carefully, and I have gone over my notes day by day, and I have been over them all again at the conclusion of the trial, I don't recall any proof that it got worse between Baltimore and his return to New York, other than the plaintiff's subjective feeling that he was getting worse. I don't recall anything which shows that the condition changed between Baltimore and New York. Dr. Hymes speculated that because the plaintiff was able to work when he went to Korea and needed an operation when he got back to New York that there must have been a change. Frankly, I think Dr. Hymes' speculation or his conclusion was not on very firm ground. Of all the experts, he was the only one whom I felt was a little bit reckless in some of his answers, and I don't give any weight to his opinion in that respect, that he speculates on that basis that the hernia worsened during the voyage. And I am not giving any weight to plaintiff's own subjective feeling that it got worse, and I don't recall anything else in the record on the subject.

The doctor who examined him here for the defendant said that even when he arrived in New York, just before his operation, he was capable of continuing to work. In fact, I cannot see anything different in his appraisal of the

hernia and that which was obtained at the Baltimore Marine Hospital and before Dr. Kelley in Baltimore.

Because of that, we don't get to the more difficult questions of the foreseeability of his bladder injury as a sequel of the delay in operation. Both Dr. Hyslop and Dr. Keating say that there really is no correlation, at least science has not been able to develop one; Dr. Keating says there is no correlation between successive operations and this kind of sequel, and Dr. Hyslop said there is no correlation between the amount of this drug administered and this kind of sequel. Dr. Keating did say there was a correlation between the amount of other types of drugs and comparable sequelae. However, this whole question would confront me only if I had concluded there was some change in the physical condition of the hernia between Baltimore and Staten Island. And if I had reached this point, then I would like briefs from counsel as to liability for unforseeable injury, but I don't think we get to that point, so I am not going to bother you or burden you with the request for briefs.

As to the nature of plaintiff's injury, I think that this man suffered from an atony of the bladder but, with the greatest respect for the defendants' expert, I don't attribute its cause to chronic prostatitis. I follow Dr. Hyslop's conclusion that it somehow resulted from the anesthesia administered on the second operation.

Because of my conclusion that there was no significant change in plaintiff's condition after his re-employment in Baltimore, under the present pleadings, it really doesn't make much difference whether we are under the Jones Act or the general maritime law. Until I heard Captain Dra-

catos testify that at the time of this voyage he and his brother were part owners of this vessel and that there was thus ownership outside of the Marchessini family, I had intended to follow plaintiff's contention and treat this as though it were an American defendant and to hold that the action was properly under the Jones Act. Now, in view of the fact that others had a beneficial interest in the vessel, I think I will give greater respect to the form of the corporate setup and treat it as a Panamanian owner in fact as well as in form and, therefore, I will apply the general maritime law.

In any event plaintiff is entitled to maintenance and cure to the point of maximum cure. Actually, we don't have much in the record to help me compute that. Certainly, as to his sexual difficulty, Dr. Hyslop and experts on both sides, said that he hasn't reached his point of maximum cure and he is entitled to it. I will leave that to computations to be submitted to me by counsel or however you think best.

Just one thing before we leave. This is out of place and it goes back to Baltimore. As a matter of fact, I haven't even discussed the question of waiver because I haven't reached that point, but I would like to make clear one thing: I do not believe that the plaintiff was overreached. I don't give weight to that part of his testimony which suggested that he was. Again, I am not sure that it is a question of dishonesty. I feel that the plaintiff at times has manifested a simple-mindedness and a lack of maturity in his appraisal of events, for example relying on gossip of soldiers as to the adequacy of hospital conditions in Pusan and, also in his own suspicion as to what went on with respect to the Immigration officials in Baltimore. I

don't see anything in the record which justifies a conclusion that defendants tried to overreach him. I think they honestly tried to get him prompt medical attention and that they were certainly willing to return him to Greece for an operation, as he wished. Although, perhaps, they weren't ready to meet every whim he had, they tried to accommodate him, certainly to all reasonable lengths.

The waiver, regardless of its nature as a defense in itself, satisfied me that defendants were not trying to get plaintiff to continue his service with them at all costs. Its language shows a pretty tough attitude towards the plaintiff not any dishonest attempt to minimize his impaired physical condition in order to get him to continue in the ship's service. It was pretty blunt. It made it clear that he could come along on the voyage if he really wanted to but at his own risk. This was spelled out to the point of warning him that his compensation would be reduced to the extent that others had to perform his duties for him.

I realize that in giving legal effect to the waivers by seamen, we look at them with the greatest care and even suspicion. I think this waiver would stand up under such scrutiny but, because of my view on the underlying question of liability, I don't have to decide this question. The waiver does, however, reflect on the plaintiff's credibility to the extent that it shows that there was no overreaching in Baltimore and it supports the credibility of the ship's captain to that extent.

(Discussion between Court and Counsel)

MR. GIALLORENZI: I would like something noted on the record about these motions. As I understand it the Court gave a decision, that you are not reserving decision?

THE COURT: No, I haven't reserved decision.

MR. GIALLORENZI: You have given your decision?

THE COURT: I have given my decision. Mr. Rassner thinks I am in error on certain points. He wants to, by brief or reargument, show me those errors, and I have said, "By all means, do so." He wants until two weeks after he gets the minutes. I would like to have it sooner than that.

(Further discussion between Court and Counsel).

/s/ LAWRENCE E. WALSH
United States District Judge

Dated: October 31, 1955.

[SAME TITLE]

OPINION
(Record Pages 814-820)

WALSH, D.J.

This was an action by a seaman against his employer to recover for disability resulting from effects of anesthesia administered in an operation to repair a hernia. He claimed that the hernia had been aggravated by acts and omissions of the defendants during a voyage from Baltimore, Maryland to Japan and return to San Francisco, and that this aggravation made necessary two operations instead of one and thereby caused the disability complained of. At the close of the case, his claim was dismissed for failure to prove any change of condition during the voyage. Thereafter, he sought to amend his complaint to state a claim for the original hernia and its aggravation during the voyage prior to arrival in Baltimore.[1] This motion was denied and plaintiff now seeks reargument.

Plaintiff is a Greek national; defendant Sociedad Maritima San Nicolas, S.A., a Panamanian Corporation; and defendant Petmar Agencies, Inc., a Delaware Corporation. The vessel on which plaintiff was employed is of Liberian registry.

Plaintiff was employed in Greece as Second Mate. From

[1]At the close of his case, before the ruling of the Court, plaintiff's counsel moved perfunctorily to conform the pleadings to the evidence but declined to state in what particulars amendment was sought.

there the vessel sailed to Bremen, Germany; Santos, Brazil; and then to Baltimore, Maryland. In Bremen, plaintiff sustained a hernia. He was examined there and in Santos. In Baltimore he signed off the vessel for return to Greece for treatment, but, faced with a few days detention at Ellis Island awaiting the ship to carry him to Greece, he, at his own request, signed back on and made the trip from Baltimore to Japan and back to this country.

Plaintiff limited his claim to aggravation of his condition after his re-employment in Baltimore. By so doing he believed that he strengthened his contention that this Court should assume jurisdiction of the subject matter and that the Jones Act was applicable. This position was maintained consistently throughout the trial. Plaintiff did offer proof of the prior events at Bremen and Santos, but this proof was received solely upon the issue of defendants' duty subsequent to re-employment in Baltimore—not as to possible fault of the defendants in Bremen or between Bremen and Baltimore. Defendants objected to its receipt for any purpose. Plaintiff acquiesced in the Court's limitation. He did not at that time seek to amend his complaint.

Plaintiff's motion to amend, at the close of the trial, was made under Rule 15(b), as a motion to conform the pleadings to the evidence. This was not a proper case for amendment under Rule 15(b) because proof had not been taken as to the claim attempted to be added to the complaint, except as incidental to other matters.[2] Even to this

[2]Indeed there was no proof of lack of seaworthiness of the vessel or negligence of defendants. Plaintiff was Second Mate. While tying up to the pier in Bremen, plaintiff was in charge of the crew on the stern. One line had been put ashore and was taken to the niggerhead of the winch. A second line was put ashore and it was necessary to heave in the slack by hand. Plaintiff, at the direction of the master, joined with the crew

extent it was taken not with the express or implied consent of the defendants but over their objection.

With respect to amendments under this subdivision Professor Moore says:

> "The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment. * * *". 3 Moore's Federal Practice 846-47.

Simms v. Andrews, 10 Cir., 118 F. 2d 803, 807, held that amendment of a pleading under comparable circumstances was not proper. The court said:

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in pulling on the line and in the course of this work sustained his hernia. There was no claim that the crew was inadequate. The claim of fault in so far as the causation of the injury was concerned apparently is that plaintiff was required to do something which was not the duty of the Second Mate, a claim supported only by plaintiff's own opinion.

After the plaintiff's injury was disclosed, the master had him examined by a doctor in Bremen. The doctor found that the plaintiff had the beginning of a hernia on both sides. An immediate operation was not recommended. At the next port of call, Santos, Brazil, plaintiff was again examined by a doctor who recommended the wearing of an elastic belt which was purchased for plaintiff and worn until he arrived in Baltimore. When examined in Baltimore both by a private physician and the Marine Hospital, plaintiff was found to have a double hernia ready for operation but not one for which operation was emergent. He was found fit for light duty.

Neither the medical records nor the other proof gives any basis for concluding that the treatment and examination the plaintiff had received to that date was inadequate or improper. The wisdom of withholding an immediate operation was not litigated, although one of plaintiff's medical experts did testify that an early operation would have been much simpler than the one plaintiff ultimately underwent.

"* * * * When the Trustee amended his pleadings, however, he did not amend them to conform to the proof, but set up an entirely new defense to the claim of the government. For the first time he pleaded the statute of limitations. That was not one of the issues in the original trial. Any evidence introduced at the time of the trial tending to bear on the statute of limitations was incidental to the question of notice and was not introduced for the purpose of this defense. An amendment after judgment stating a new cause of action or a new defense is not permissible under the guise of conforming the pleadings to the proof and the court was right in striking the amendments from the records and reinstating the original judgment****".

See also *United States v. City of Brookhaven*, 5 Cir., 134 F. 2d 442, 446; *Nordstrom v. McAllister Brothers, Inc.*, S.D.N.Y., 9 F.R. Service, 15b 1, Case 5. The proposed new claim, not having been an issue tried by express or implied consent of the parties, was not an amendment authorized by Rule 15(b).

The amendment sought is perhaps within the power of the court under subdivision (a) of Rule 15[1], but even if it were within the power of the court under either subdivision (a) or subdivision (b), this was not a case in which the power should have been exercised. Plaintiff's failure to move to amend in advance of trial was deliberate and not excusable. Plainitff's trial counsel had been retained nine months before trial. The case had been sent out for trial and settlement negotiations abandoned one week before the trial actually commenced. Even busy trial counsel

[1]It is said that this power may be exercised even after trial. 1 Barron and Holtzoff Federal Practice and Procedure 889, Section 446.

had had adequate opportunity to familiarize himself with the case and to make his final decision as to the theory on which he intended to proceed. None of the testimony at the trial was unanticipated.

Plaintiff's counsel claims that the amendment should be allowed because defendants' counsel was not surprised. Plaintiff's counsel had in fact badgered his opponent with the **possibility** of this amendment and with others which he never requested[4] but he had never given notice of an intent to amend. The discussion of possible amendments was merely an incident in a war of nerves designed to keep defendants and the court guessing as to what plaintiff's claim would ultimately prove to be. These are tactics a court should decline to aid or abet.

Plaintiff's motion for reargument of the denial of leave to amend is denied.

There remains the question of the amount to which plaintiff is entitled as maintenance and cure. It is my conclusion that he should receive $8.00 a day for a period from July 17, 1952 when he left the vessel, until January 5, 1953, except for the period from July 31, 1952 to September 24, 1952, when he was a patient in the Marine Hospital at Staten Island. After January 5, 1953 he was not entitled to maintenance and cure because he failed to return to the Marine Hospital for further treatment as directed.

[4]For example, during settlement conference plaintiff's counsel also threatened to amend the complaint to charge defendants with alleged inadequate treatment by the Marine Hospital as their agent. At the opening of the trial he disclaimed any such theory of liability.

This leaves, as a possible basis for future action, his claim based upon a corrective operation and recuperation therefrom if one is had.

It is so ordered.

Dated: December 31, '55

LAWRENCE E. WALSH,
United States District Judge.

[SAME TITLE]

JUDGMENT
(Record Pages 821-823)

The plaintiff, CONSTANTINE MACRIS, having commenced this action against the defendants, SOCIEDAD MARITIMA SAN NICOLAS S.A., and PETMAR AGENCIES INC., alleging a first cause of action for damages for personal injuries and a second cause of action for maintenance and cure arising out of his service as an officer on the Steamship "EURYVIADES", and the action having duly come on for trial before the Honorable Lawrence E. Walsh, United States District Judge, without a Jury, and the plaintiff having appeared by Jacob Rassner, Esq. and the defendants by Renato C. Giallorenzi, Esq., and having submitted their respective proofs and rested, and the plaintiff having moved to amend his complaint and to conform the pleadings to the proof and due deliberation having been had thereon, and the Court in its opinion made at the conclusion of trial on October 31, 1955, and filed herein on November 17, 1955, having denied plaintiff's motion to amend his complaint and having found that said Steamship "EURYVIADES" was owned by the defendant, SOCIEDAD MARITIMA SAN NICOLAS, S.A., and having further found for defendant and against plaintiff on his first cause of action for damages for personal injuries, and having found for plaintiff and against defendant SOCIEDAD MARITIMA SAN NICOLAS S.A. on his second cause of action for maintenance and cure, and the plaintiff having moved for a reargument of his motion to amend his complaint and to con-

form the pleadings to the proof and due deliberation having been had thereon, and the Court in its opinion made and filed herein on December 31, 1955, having denied plaintiff's motion for reargument of the denial of leave to amend his complaint and having found that plaintiff should receive maintenance and cure at the rate of $8.00 per day for a period from July 17, 1952, until January 5, 1953, except for the period from July 31, 1952, to September 24, 1952,

NOW, on motion of RENATO C. GIALLORENZI, attorney for defendants, it is

ORDERED AND ADJUDGED, that defendant, PETMAR AGENCIES, INC., have judgment dismissing the complaint of CONSTANTINE MACRIS against said defendant, PETMAR AGENCIES, INC. and it is further

ORDERED AND ADJUDGED that defendant, SOCIEDAD MARITIMA SAN NICOLAS S.A. have judgment dismissing the first course of action of the complaint of CONSTANTINE MACRIS against said defendant SOCIEDAD MARITIMA SAN NICOLAS, S.A. and it is further

ORDERED AND ADJUDGED that plaintiff, CONSTANTINE MACRIS have judgment against defendant, SOCIEDAD MARITIMA SAN NICOLAS S.A. for the sum of $928.00 on the second cause of action of the complaint.

Dated, New York, N. Y.
January 16th, 1956.

LAWRENCE E. WALSH,
U.S.D.J.

Judgment entered January 18, 1956.

WILLIAM V. CONNELL,
Clerk.

I hereby consent to the entry of the Judgment.

s JACOB RASSNER